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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN W. SHOEMAKER, Chief,
Ohio Adult Parole Authority,

*Petitioner,*

v.

JOSEPH RILEY,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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**WILLIAM J. BROWN**
*Attorney General of Ohio*

**DAIN N. DE VENY**
*Counsel of Record*
*Assistant Attorney General*

**RICHARD DAVID DRAKE**
**SIMON B. KARAS**
*Assistant Attorneys General*

*State Office Tower*
*30 East Broad Street, 26th Floor*
*Columbus, Ohio 43215*
*(614) 466-5414*

**Attorneys for Petitioner**

## QUESTIONS PRESENTED

I. DOES STONE V. POWELL, 428 U.S. 465 (1980) PERMIT FEDERAL HABEAS CORPUS REVIEW OF A FOURTH AMENDMENT CLAIM SIMPLY BECAUSE THE FEDERAL COURT BELIEVES THE STATE COURTS ERRED IN THAT PARTICULAR CASE?

II. SHOULD THERE BE A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE WHERE LAW ENFORCEMENT OFFICERS, WHO HAVE SUFFICIENT PROBABLE CAUSE TO OBTAIN A SEARCH WARRANT, CONDUCT A CONSENSUAL SEARCH ACTING UPON AN OBJECTIVE GOOD FAITH BELIEF THAT THE PERSON CONSENTING TO THE SEARCH HAS ACTUAL AUTHORITY TO CONSENT?

## PARTIES

The petitioner in this action is John W. Shoemaker in his capacity as Chief of the Ohio Adult Parole Authority. The respondent is Joseph Riley.

## STATUS OF PARTIES

At the time of the lower court action the respondent Joseph Riley was in the custody of Frank H. Gray, Superintendent of the Ohio State Reformatory. Subsequently respondent was granted a parole and came into the constructive custody of petitioner John W. Shoemaker.

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## DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported as **Riley v. Gray**, 674 F.2d 521 (6th Cir. 1982) (A-1). The decision of the United States District Court for the Northern District of Ohio, Eastern Division is unreported. (A-26). The decision of the Ohio Court of Appeals, Third Judicial District is unreported. (A-31).

## JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered March 22, 1982. Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The case involves Amendment IV to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The case also involves Section 1 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN W. SHOEMAKER, Chief,
Ohio Adult Parole Authority,

*Petitioner,*

v.

JOSEPH RILEY,

*Respondent.*

## STATEMENT OF THE CASE

Respondent, Joseph Riley, was indicted by the September, 1976 Term of the Paulding County, Ohio, Grand Jury for aggravated trafficking, trafficking in marijuana, drug abuse (3 counts), possession of dangerous ordnance, carrying a concealed weapon, kidnapping and aggravated menacing in violation of Ohio Revised Code Sections 2925.03(A)(6); 2925.11(a), 2923.17, 2923.12, 2905.01 and 2903.21, respectively. Respondent, while represented by counsel, was tried to a jury and found guilty of aggravated trafficking in drugs, trafficking in marijuana and drug abuse and was sentenced to terms of four (4) to fifteen (15), three (3) to ten (10) and two (2) to five (5) years imprisonment. The other charges in the indictment were dismissed pursuant to the State's motion prior to trial.

Before trial, respondent filed a motion to suppress certain items which had been seized pursuant to a search

warrant. The hearing on the motion to suppress revealed that on September 29, 1976, police officers from the Paulding Village Police Department arrived at a tavern known as the Red Owl Bar in response to a report of a shooting. Officer Walter Heinrichs, arriving at the Red Owl, saw respondent lying in the doorway of the tavern bleeding from a gunshot wound. Another man who was tending to respondent indicated that the man who had shot respondent was in the tavern restroom.

Heinrichs went to the restroom where he found James Christian who was vomiting into the toilet.

Christian explained to Heinrichs that he had accidentally shot respondent, at which point Heinrichs asked to see the gun that Christian had used. Christian led Heinrichs to a second floor apartment located over the tavern, produced the keys to the apartment and attempted to open the door. Christian was shaking too hard to open the door and handed the keys to Officer Heinrichs who unlocked the door and took about two steps into the apartment where he could observe a revolver lying on the kitchen table. After looking quickly around the apartment Heinrichs left, locking the door and keeping the keys.

Shortly thereafter, Chief of Police Charles Watson arrived as did Deputy Dave Harrow of the Paulding County Sheriff's Department. Heinrichs, Watson and Harrow returned to the apartment with Christian. Christian explained again that the shooting had been accidental while he and respondent were "tussling." Christian pointed out where he and respondent had been standing and demonstrated how the shooting had occured. The officers observed the weapon on the kitchen table and blood on the floor. Chief Watson, in Christian's

presence, asked Deputy Harrow to "process the scene" i.e. take photographs and collect the physical evidence. At that time Christian and Watson left, going to the Sheriff's Department. Christian indicated that he did not want to make any further statements until he had spoken to an attorney.

Respondent, Joseph Riley, who was seriously wounded, had been removed by ambulance to a hospital before Chief Watson and Deputy Harrow arrived at the tavern.

Harrow, while collecting evidence, noticed what appeared to be a bullet hole in the wall between the kitchen and bedroom. He entered the bedroom in an effort to trace the bullet's trajectory. He then observed bags of marijuana, other drugs, and drug paraphenalia lying on the top of a dresser. He also observed other firearms. Harrow phoned the prosecutor and it was decided that a search warrant would be sought for a thorough search of the premises. It was while the search warrant was being prepared that the officers involved first learned that the apartment to which Christian had led them was rented to respondent, Joseph Riley. Items seized pursuant to the warrant resulted in the charges against Riley.

At the hearing on the motion to suppress the police officers testified that at the time Christian led them to the apartment they had no knowledge that it was respondent's apartment. They also denied that respondent was the subject of any investigation at the time they initially entered the apartment.

Neither respondent nor Christian testified at the suppression hearing in the Ohio Court of Common Pleas.

The state trial court overruled the motion to suppress finding that Christian had consented to the observation of the apartment. The court held:

> Consequently, the court finds that Officer Harrow had a right to be where he was when observing in plain view objects referred to in his search warrant testimony.

It should be noted that there was no evidence introduced at the suppression hearing that, contrary to all reasonable inferences, Christian had not had actual authority to consent to the initial observations of the apartment.

Respondent pursued a direct appeal to the Ohio Court of Appeals, Third District, asserting *inter alia:*

> Denial of defendant-appellant's motion to suppress constituted prejudicial error since the warrant for the search of the defendant-appellant's house was not obtained until after police had entered and searched the premises in violation of the defendant-appellant's rights under the fourth and fourteenth amendments to the United States Constitution.

The appellate court devoted some five (5) pages of its opinion to a consideration of respondent's Fourth Amendment claim. The Court of Appeals held that Riley had failed to establish the requisite standing to object to the search. The court went on to state:

> We find this independently of the possibility of the legality of the search due to the consent of Christian who exercised some

dominion over the apartment. *See* **Frazier v. Cupp, 394 U.S. 731, 89 S. Ct. 1420.** (A-34).

Respondent's ensuing motion for leave to appeal was overruled by the Supreme Court of Ohio.

Respondent thereafter filed a petition for writ of habeas corpus with the United States District Court for the Northern District of Ohio, Western Division. Petitioner filed a return of writ arguing that as respondent was afforded a full pretrial evidentiary hearing by the Common Pleas Court on his suppression motion, and as that judgment was reviewed and affirmed by the Court of Appeals, consideration of the Fourth Amendment claim was barred by the doctrine of **Stone v. Powell, 428 U.S. 465 (1976).** On January 9, 1980, the magistrate issued a memorandum and order holding that **Stone v. Powell,** *supra,* did not bar consideration of respondent's Fourth Amendment claim because the state appellate court had erroneously determined the "standing" issue. (A-14). Petitioner thereafter filed a memorandum contra the magistrate's report disputing the analysis which the magistrate had attributed to the Stone decision.

On August 12, 1980, an evidentiary hearing was held before the district court. It was at this hearing that respondent and James Christian testified for the first time in the history of the case. This was also the first time that any evidence was heard that tended to show that, contrary to the reasonable conclusions to be drawn from Christian's actions on the night of the shooting, Christian had no actual authority to consent to a search of the apartment.

Watson, Heinrichs and Harrow also testified in the district court. They again testified that at the time

Christian led them to the apartment, produced the keys and explained the shooting, they had not known that this was respondent's apartment rather than Christian's.

On September 5, 1980, the district court issued an opinion and order rejecting respondent's Fourth Amendment claim. The district court apparently based its decision on the existence of probable cause to search. Significantly, the court also observed that the initial entry by the police was made ". . . acting on the apparent though non-existent authority of Christian to permit, . . . ." (A-24).

Respondent filed a timely motion for relief from judgment pursuant to Rule 60(b)(1) and (6), and Rule 59(e) of the Federal Rules of Civil Procedure. In an opinion and order filed January 22, 1981, the district court granted the motion and granted habeas corpus relief. (A-26). Clarifying the facts, the court held that while the first entry by officer Heinrichs was justified as an emergency exception to the warrant requirement, the later warrantless entries could not be justified by exigent circumstances.

The court also rejected consent by Christian based on Christian's apparent authority. While finding that apparent authority "may have appeared" the court held that actual authority was required.

> The only other justification advanced by defendant for the warrantless search is that Mr. Christian consented to the search. It was clear from the hearing that although Mr. Christian may have appeared to have had authority to permit entry because he had possession of the

> keys, he had no actual authority. Therefore, the warrantless search cannot be justified on the basis of consent. **United States v. Matlock**, 415 U.S. 164 (1974); **United States v. Cook**, 530 F.2d 145 (7th Cir. 1979). (A-30).

Petitioner appealed from the judgment granting habeas corpus relief to the United States Court of Appeals for the Sixth Circuit arguing that **Stone v. Powell**, *supra*, bars habeas corpus review of the respondent's Fourth Amendment claim and that the purpose of the exclusionary rule would not be served by the suppression of the evidence seized in this case, because the officers had a reasonable, objective good faith belief that Christian had authority to consent to the search and that the search was lawful. The Court of Appeals affirmed the district court judgment on March 22, 1982. (A-1). The court of appeals properly noted a division of authority in the various cricuit courts as to both the **Stone v. Powell**, *supra* question and the issue of whether there exists a good faith exception to the Fourth Amendment.

## ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

### I.

### DOES STONE V. POWELL, 428 U.S. 465 (1980) PERMIT FEDERAL HABEAS CORPUS REVIEW OF A FOURTH AMENDMENT CLAIM SIMPLY BECAUSE THE FEDERAL COURT BELIEVES THE STATE COURTS ERRED IN THAT PARTICULAR CASE?

This petition raises important questions of national interest. The United States Court of Appeals for the Sixth Circuit has, by the decision below, placed itself in direct conflict with the United States Court of Appeals for the Fifth Circuit and has made this Court's decision in **Stone v. Powell**, 428 U.S. 465 (1976) little more than a hollow shell if not an outright nullity.

In **Stone v. Powell** this Court held:

> [W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial societal costs of application of the rule persist with special force. 428 U.S. 494-495 (footnotes omitted)

Notwithstanding this unequivocal mandate, the Sixth Circuit, by the decision below, has created a precedent which would permit federal courts to continue reviewing Fourth Amendment claims in the prohibited context and granting relief where they believe the state courts have erred in the application of the exclusionary rule despite the fact that the state provides a clearly adequate opportunity to fully and fairly litigate Fourth Amendment claims.

The Sixth Circuit's error resulted from that court's failure to take any cognizance of the character and purpose of the exclusionary rule as developed in this Court's prior decisions and fully explained in **Stone v. Powell.** As this Court summarized:

> The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights. Post-Mapp decisions have established that the rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any "[r]eparation comes too late." . . . But despite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons. As in the case of any remedial device, "the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." 428 U.S. 486-487 (citations omitted).

The decision in **Stone v. Powell** contemplated a bar to habeas corpus review where a state provides an efficacious remedy to litigate these Fourth Amendment claims; the decision did not contemplate that the state must provide a remedy that could never err nor that review would be barred only where a federal court believes that the state court has reached the "correct" result.

The Sixth Circuit examined Ohio's mechanism for the resolution of the Fourth Amendment claims and found it "clearly adequate" (A-7). There is no suggestion that the Ohio courts in applying this mechanism lack the appropriate sensitivity to constitutional rights nor that those courts lack the expertise to apply federal constitutional law. There is no suggestion that the Ohio courts do not generally reach the correct result in applying the exclusionary rule thereby creating a deterrent to future unlawful police conduct. The only finding the Sixth Circuit made was that in respondent's case the state courts committed an "understandable" error.

The Fifth Circuit's application of **Stone v. Powell** is in direct conflict with the Sixth Circuit's. The test applied by the Fifth Circuit was developed in a series of decisions culminating with **Williams v. Brown**, 609 F.2d 216, 220 (5th Cir. 1980):

> In **Caver v. Alabama**, 577 F.2d 1188 (5th Cir. 1978), this court observed that it is the existence of state processes allowing an opportunity for full and fair litigation of fourth amendment claims, rather than a defendant's use of those processes, that serves the policies underlying the exclusionary rule and bars federal habeas corpus consideration of claims under **Stone v. Powell**. *Id.* at

1192-93. In **Caver**, we held that, "if state procedures afford the defendant in a criminal case the opportunity to [fully and fairly] litigate whether evidence obtained in violation of the fourth amendment should be excluded . . . then **Stone v. Powell** precludes federal habeas corpus consideration of those issues whether or not the defendant avails himself of that opportunity." *Id.* at 1193.

Moreover, subsequent to **Caver** this court held that the bar of **Stone v. Powell** still applies despite a state court error in deciding the merits of a defendant's fourth amendment claim. **Swicegood v. Alabama**, 577 F.2d 1322, 1324-25 (5th Cir. 1978). Here, however, the state court mistake occurred not when deciding the merits of the fourth amendment claim, but in ruling on whether the claim had already been presented. This error prevented the state habeas corpus court from considering the merits of Williams' fourth amendment claim. Nevertheless, in the absence of allegations that the processes provided by a state to fully and fairly litigate fourth amendment claims are routinely or systematically applied in such a way as to prevent the actual litigation of fourth amendment claims on their merits, the rationale of **Caver** dictates that **Swicegood's** application of **Stone**

> despite a mistake in adjudicating the merits must apply with equal force to procedural mistakes that thwart the presentation of fourth amendment claims. Accordingly, we find that the district court correctly dismissed petitioner's fourth amendment claims as being barred by **Stone v. Powell.**

Petitioner submits that the Fifth Circuit's application of **Stone v. Powell** is the correct one.

If the Sixth Circuit's decision is allowed to stand, that court, and undoubtedly others, will continue to treat the suppression of evidence not as the awesome social cost attendent to the deterrent effect of the exclusionary rule, but rather as a constitutional requisite it was never intended to be. That court will continue to exact these "substantial societal costs" at a time when the contribution, if any, is "minimal."

The petition should be granted to eliminate the conflict between the Circuits and to guarantee the continued vitality of **Stone v. Powell.**

## II.

**SHOULD THERE BE A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE WHERE LAW ENFORCEMENT OFFICERS, WHO HAVE SUFFICIENT PROBABLE CAUSE TO OBTAIN A SEARCH WARRANT, CONDUCT A CONSENSUAL SEARCH ACTING UPON AN OBJECTIVE GOOD FAITH BELIEF THAT THE PERSON CONSENTING TO THE SEARCH HAS ACTUAL AUTHORITY TO CONSENT?**

The instant case presents an important issue of constitutional law regarding the scope of the exclusionary rule as fashioned by this Court in **Weeks v. United States**, 232 U.S. 383 (1914) and thereafter made applicable to the states in **Mapp v. Ohio**, 367 U.S. 643 (1961).

It is now well settled that the exclusionary rule is not coextensive with the Fourth Amendment nor otherwise compelled by the Constitution. *See* e.g., **Stone v. Powell**, 428 U.S. 465 (1976); **United States v. Calandra**, 414 U.S. 338 (1974). Rather, the exclusionary doctrine is a judge-made rule crafted to enforce Fourth Amendment requirements. The rule has been characterized by this Court as a mere "remedial device." **United States v. Calandra**, *supra*, at 348. The sole purpose of the exclusionary rule is that it seeks to deter future police misconduct and thereby secure the proscriptions of the Fourth Amendment to the Bill of Rights.

The exclusionary rule exacts a heavy toll on law enforcement and, concomitantly, from society as a whole. The rule inevitably operates to suppress reliable and probative evidence from reception by the trier of fact and, when invoked, most often results in a patently guilty offender escaping societal sanction. In point of fact, the rule can only aid the guilty, i.e., if the unconstitutional intrusion results in the discovery of no wrongdoing, there is simply nothing to "suppress." While the exclusionary rule can only operate to exculpate the guilty with respect to an individual case, its justification lies in the stated purpose that it acts as a deterrent against "future police misconduct."

Both federal and state authorities, through their respective courts and legislative bodies are currently in the process of reconciling the inherent conflict of the

exclusionary rule and are uniformly arriving at a consensus view toward harmony with the right of persons to be secure in their effects and property and the enigma of freeing only the guilty. The consensus view thus far obtained is a good-faith exception to the exclusionary rule. It is precisely this consensus by courts, legislatures, and commentators alike which makes the herein case one of national importance.

The good faith exception to the exclusionary rule is hardly an emerging or embryonic concept. Indeed, the Arizona legislature only recently [April 20, 1982] enacted a model law which allows for such an exception.[1]

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1. Arizona Revised Statutes, Section 1, Title 13, Chapter 38, Article 8 now provides as follows:

> 13-3925. Admissibility of evidence obtained as a result of unlawful search or seizure.
>
> A. If a party in a criminal proceeding seeks to exclude evidence from the trier of fact because of the conduct of a peace officer in obtaining the evidence, the proponent of the evidence may urge that the peace officer's conduct was taken in a reasonable, good faith belief that the conduct was proper and that the evidence discovered should not be kept from the trier of fact if otherwise admissible.
>
> B. The trial court shall not suppress evidence which is otherwise admissible in a criminal proceeding if the court determines that the evidence was seized by a peace officer as a result of a good faith mistake or technical violation.
>
> C. In this section:
>
> 1. "Good faith mistake" means a reasonable judgmental error concerning the existence of facts which if true would be sufficient to constitute probable cause.

*(footnote contd.)*

Congress has before it similar legislation. [S. 2231 (introduced May 18, 1982)]. To like effect, the federal and state judiciary have perceived the need to reconcile the stated purpose of the exclusionary rule with police conduct which, only in detached retrospection, constitutes a violation of the Fourth Amendment. *See* e.g., **United States v. Williams**, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981); **People v. Adams**, 53 N.Y. 2d 241, 423 N.E. 2d 379 (1981). *See also*, **Robberson Steel Co. v. O.S.H.A.**, 645 F.2d 22 (10th Cir. 1980); **United States v. Wilson**, 528 F. Supp. 1129 (S.D. Fla. 1982).

The chilling effect upon both courts and legislatures is the perceived and perhaps real fear that their efforts to arrive at a reasoned assessment of what the exclusionary

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2. "Technical violation" means a reasonable good faith reliance upon:

(a) A statute which is subsequently ruled unconstitutional.

(b) A warrant which is later invalidated due to a good faith mistake.

(c) A controlling court precedent which is later overruled, unless the court overruling the precedent orders the new precedent to be applied retroactively.

D. This Section shall not be construed to limit the enforcement of any appropriate civil remedy or criminal sanction in actions pursuant to other provisions of law against any individual or government entity found to have conducted an unreasonable search or seizure.

E. This section does not apply to unlawful electronic eavesdropping or wiretapping.

rule commands will ultimately be annulled by this Court. While the conflict in the federal circuits should in and of itself command this Court's review, this greater threat to federal and state innovation most assuredly warrants plenary review by this Court. Denial of review by this Court can only result in a stagnation of efforts to arrive at a reasoned accommodation to those core Fourth Amendment values which must remain inviolate and the types of mandated exclusionary rule decisions which unnecessarily impede respect for the courts by blithely allowing the guilty to remain free.

The undisputed factual scenario presented by the instant case is precisely that which the deterrence foundation of the exclusionary cannot accommodate.

Officer Heinrichs was summoned to the rural community tavern in response to a call that a man had been shot. After ascertaining that the victim [the respondent] would receive emergency medical aid, he placed the assailant [Christian] under arrest. The following uncontroverted events then ensued: (1) Christian led the officer up to the upstairs apartment; (2) Christian produced the keys to a locked apartment; (3) Christian endeavored to open the door but was shaking too much; (4) Christian gave the keys to Heinrichs; (5) Heinrichs opened the door, saw the weapon, and secured the area; (6) another officer arrived, the door was again opened and Christian "re-enacted" the shooting; (7) Christian requested an attorney and all questioning, perforce, ceased; (8) Christian was taken into custody; (9) other officers commenced "processing" the crime scene", i.e., obtaining physical evidence; (10) that the trajectory of a bullet indicated that it had gone through the wall into the bedroom; (11) that upon entry into the bedroom, the officers discovered in plain view substantial quantities of

drugs and drug paraphernalia; (12) that the officers immediately contacted the prosecutor's office in order to obtain a search warrant; (13) that in processing the warrant it became known to the law enforcement officials, in the first instance, that respondent rather than Christian leased the apartment.

It is simply undisputed that the officers were at all pertinent times proceeding upon the good faith belief that Christian occupied the apartment and thus had authority to consent to the ensuing search. While the circuit court below went to extraordinary lengths to avoid the clear issue presented, the fact remains that the officers had every objective good faith reason to believe that Christian had the authority to authorize entry into the apartment. The officers most assuredly had the requisite probable cause upon which a search warrant could have been obtained and, faced with the same set of circumstances, any officer [and perhaps many constitutional scholars] would have acted precisely as did the police officials herein.

The respondent herein goes free not because "the constable blundered" in any realistic scene but, rather, because an *ad hoc* and hyper-technical review of the facts has been found wanting years later by a reviewing court. To state that the ruling of the court below will deter "police misconduct" is nothing short of sheer sophistry.

To mandate application of the exclusionary rule to facts such as those presented in the instant case is to wholly convolute the very underpinning of the doctrine itself. While many advocates of the good faith exception to the rule have espoused its benefits, perhaps the most succient statement is that of the Fifth Circuit in **United States v. Williams**, *supra*, wherein the majority of the *en banc* court stated:

> Predictably, it will be argued that today's decision undercuts the fourth amendment. Not so; it concerns only the exclusionary rule, one device-but not the sole one-for enforcing the amendment, and a device that is already far from co-extensive with the amendment itself. As for the exclusionary rule, insofar as we restrict its application, we do so only to conform that to its underlying purpose: to deter unreasonable or bad-faith police conduct.
>
> Where the reason for a rule ceases, the rule should also cease-a familiar maxim carrying special force here. For here the cost of applying the rule is one paid in coin minted from the very core of our factfinding process, the cost of holding trials at which the truth is deliberately and knowingly suppressed and witnesses, in contravention of their oaths, are forbidden to tell the whole truth and censured if they do. This is a high price indeed and one that ought never be paid where, in reason, no deterrence is called for and none can in fact be had. Such a continued wooden application of the rule beyond its proper ambit to situations that its purposes cannot serve bids fair to destroy the rule entirely in the long run. *Id.* at 847.

The instant case presents an ideal vehicle for this Court to fully consider whether there should exist a good faith exception to the judicially created exclusionary rule. The courts and legislatures of both the federal and

state governments await guidance from this Court. As such, certiorari should be granted to resolve this issue of national importance.

Respectfully submitted,

**WILLIAM J. BROWN**
*Attorney General of Ohio*

**DAIN N. DE VENY**
*Counsel of Record*
*Assistant Attorney General*

**RICHARD DAVID DRAKE**
**SIMON B. KARAS**
*Assistant Attorneys General*

*State Office Tower*
*30 East Broad Street, 26th Floor*
*Columbus, Ohio 43215*
*(614) 466-5414*

**Attorneys for Petitioner**

## CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition for Writ of Certiorari have been served on respondent, Joseph Riley, by forwarding such copies through the office of his counsel, John F. Potts, 4334 West Central Avenue, Suite 231, Toledo, Ohio 43615, bv United States Mail, postpaid, this _____ day of June, 1982. I further certify that all parties required to be served have been so served. Respondent's address is c/o Mary Riley, Route 3, Paulding, Ohio 45879.

_____

**DAIN N. DE VENY**
*Assistant Attorney General*

## APPENDIX

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Opinion, March 22, 1982, United States Court of Appeals for the Sixth Circuit, **Riley v. Gray**, 674 F.2d 521 (6th Cir. 1982) ..... A-1

Order, January 9, 1980, United States District Court for the Northern District of Ohio, Western Division holding that **Stone v. Powell**, 428 U.S. 465 (1976) did not preclude review of the Fourth Amendment claim and ordering that an evidentiary hearing be conducted ..... A-14

Order, September 5, 1980, United States District Court for the Northern District of Ohio, Western Division dismissing habeas corpus petition ..... A-22

Order, January 22, 1981, United States District Court for the Northern District of Ohio, Western Division granting motion to alter or amend pursuant to Rule 59(d) and ordering that the writ of habeas corpus issue. . . A-26

Opinion, January 20, 1978, Ohio Court of Appeals for the Third Judicial District, affirming the trial court judgment. ..... A-31

No. 81-3097

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOSEPH RILEY,
*Petitioner-Appellee,*

v.

FRANK H. GRAY, Supt.,
*Respondent-Appellant.*

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ON APPEAL from the United States District Court for the Northern District of Ohio, Western Division.

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Decided and Filed March 22, 1982.

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Before: EDWARDS, Chief Judge, JONES, Circuit Judge; CELEBREZZE, Senior Circuit Judge.

CELEBREZZE, Senior Circuit Judge. This appeal raises questions concerning the scope of federal habeas corpus relief, 28 U.S.C. Sec. 2254, for violations of the fourth amendment. The district court issued the writ, finding that violations of the fourth amendment had occurred. The respondent-appellant, Frank H. Gray, appeals from the order granting the writ, asserting that *Stone v. Powell*, 428 U.S. 465 (1976), precludes review of the petitioner's fourth amendment claims in federal habeas proceedings and that the deterrent purpose of the exclusionary rule would not be served by excluding the evidence used to convict Riley. We believe that habeas relief was properly granted and, therefore, we affirm.

The petitioner occupied an apartment over the Red Owl Bar in Paulding, Ohio. On September 29, 1976, Police Officer Walter Heinrichs was summoned to the Red Owl, and upon arriving he found the petitioner lying in the doorway of the tavern, bleeding from a gunshot wound. Heinrichs went to the lavatory in the rear of the tavern, where he found James Christian, who indicated that he had accidentally shot Riley. Heinrichs asked to see the weapon which had been used. Christian led him through the tavern and to the door of the second floor apartment. The door, which was the only entrance to the apartment, was locked. Christian gave the key to Heinrichs.[1] Heinrichs opened the door, stepped inside and immediately noticed a revolver lying on the kitchen table. After making a cursory examination of the apartment, he left, closing and locking the door behind him. Heinrichs retained possession of the keys.

Shortly after this initial entry, the Chief of Police, Charles Watson, arrived at the Red Owl Bar. Using the key furnished by Heinrichs, Watson entered the apartment and saw the gun on the table, as well as blood on the floor. After this brief entry Heinrichs again locked the door.

The final warrantless entry was made by Heinrichs and Deputy Sheriff David Harrow. The Paulding Police Department had summoned Harrow because of his expertise in collecting and evaluating physical evidence. Harrow was to "process" the second floor apartment by removing, photographing, and evaluating any physical evidence which was found. While conducting the investi-

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1 Christian testified, in the hearing held by the district court, that he took Riley's keys as he was leaving the apartment, after having already shot Riley. Apparently, he picked up the keys and locked the door behind him.

gation, Harrow noticed a bullet hole in the wall between the kitchen and the bedroom. In an effort to find the bullet, Harrow entered the bedroom and discovered a variety of contraband, including automatic weapons, marijuana, and lysergic acid diethlamide (LSD). The officers immediately secured the apartment and left to obtain a search warrant. The officers indicated that they first learned that the apartment belonged to Joseph Riley when preparing the affidavits necessary to obtain the search warrant. The police obtained a warrant that evening, approximately five hours after Officer Heinrichs' initial entry.

After the contraband was seized, the Paulding County Grand Jury indicted Riley for aggravated trafficking, trafficking in marijuana, drug abuse, possession of a dangerous ordnance, and carrying a concealed weapon. Riley moved to suppress the contraband, but the motion was denied. Riley was convicted of aggravated trafficking, trafficking in marijuana, and drug abuse. Riley appealed to the Ohio Court of Appeals for the Third District and argued that the drugs should have been suppressed because they had been seized pursuant to a warrant based on information obtained in the warrantless search of his home, in violation of his fourth and fourteenth amendment rights. The Ohio Court of Appeals ruled that Riley lacked standing to challenge the search. The state did not raise the standing issue in the trial court and neither party briefed or argued the issue. The Ohio Supreme Court overruled Riley's motion for leave to appeal.

In May, 1979, Riley filed a petition for a writ of habeas corpus with the United States District Court for the Northern District of Ohio. The respondent filed a

return of the writ and argued that habeas review was precluded by *Stone v. Powell,* 428 U.S. 465 (1976). The matter was referred to a magistrate, who determined that habeas review was not precluded, and recommended that an evidentiary hearing be held. The district court adopted the magistrate's conclusion that *Stone* did not bar habeas review, held an evidentiary hearing, and concluded that the fourth amendment claim was without merit and should be dismissed. The petitioner filed a motion for reconsideration with the court, pointing out that *Mincey v. Arizona,* 437 U.S. 385 (1978), held that no "crime scene" exception to the warrant requirement exists. The district court reevaluated the record, determined that the search could not be justified on the basis of exigent circumstances or consent, and issued the writ.

The threshold issue is whether *Stone v. Powell,* 428 U.S. 465 (1976), prevents habeas review of the petitioner's fourth amendment claims. *Stone* precludes habeas review "where the State has provided an opportunity for full and fair litigation of a fourth amendment claim . . . ." *Id.* at 494. This circuit, in *Moore v. Cowan,* 560 F.2d 1298 (6th Cir. 1977), concluded that *Stone* did not require that the state court rule on the merits of each claim. *Id.* at 1302. Instead, we indicated that the state court need do not more than "take cognizance of the constitutional claim and rule in light thereof." *Id.* Thus, in deciding whether the petitioner received an opportunity for a full and fair hearing in the state court, we must determine whether the state court took "cognizance" of the petitioner's claim.

The respondent argues that *Stone* requires only that the state provide the procedural mechanism for the presentation of fourth amendment claims. The respondent asserts that the scope of our inquiry is limited to the

opportunity available in theory, and the opportunity which is in fact afforded to a particular litigant is of no consequence. *E.g., Caver v. Alabama*, 577 F.2d 1188, 1193 (5th Cir. 1978). For example, in *Williams v. Brown*, 609 F.2d 216 (5th Cir. 1980), the state court failed to reach the merits of the fourth amendment claim because of a procedural error. In affirming the district court's dismissal of the petition, the Fifth Circuit stated that "in the absence of allegations that the proceedings provided by a state to fully and fairly litigate fourth amendment claims are systematically applied in such a way as to prevent the actual litigation of fourth amendment claims . . . . *Stone* must apply with equal force to procedural mistakes that thwart the presentation of fourth amendment claims." *Id.* at 220. The inquiry is limited to the adequacy of the mechanism in the abstract; its effectiveness in a particular situation is not pertinent.[2]

The petitioner argues for a narrower interpretation of *Stone*. Essentially, he relies upon *Gamble v. Oklahoma*, 583 F.2d 1161 (10th Cir. 1978), in which the Tenth Circuit concluded that "[o]pportunity for full and fair consideration includes, but is not limited to, the procedural opportunity to raise or otherwise present a Fourth Amendment claim. It also includes the full and fair evidentiary hearing contemplated by *Townsend*. Furthermore, it contemplates recognition and at least colorable application of the correct fourth amendment constitutional standards." *Id.* at 1165. Thus, the Tenth Circuit reviews the merits of the fourth amendment claim, at least to determine if there was egregious error.

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2 The Seventh Circuit has adopted a similar position with respect to *Stone*. *See United States ex rel. Maxey v. Morris*, 591 F.2d 386, 388-89 (7th Cir. 1979) (procedural opportunity was all that *Stone* requires). The Seventh Circuit has not, however, faced a factual situation similar to *Williams*.

We believe that neither position is wholly satisfactory. The respondent's position is not entirely consistent with *Stone*. *Stone* is based on the perception that the exclusionary rule should not be applied in federal habeas review of a state conviction because of its limited utility in that setting. *Stone*, 428 U.S. at 494, 495. Implicit in the Court's analysis is the belief that if an issue has been considered at trial, and on direct appeal of the state court conviction, then the issue is close, involving nuances of the fourth amendment which may be too complex to allow easy application by police officers. In these situations, the special deterrent value of the exclusionary rule is at its nadir and should not be applied. *Id.* at 538-40 (White, J., dissenting). Thus, the value of reviewing these claims collaterally is small. *Stone* is predicated on the Court's assessment of the exclusionary rule's utility; application of the rule is justified when the state court denies the petitioner a full and fair opportunity to litigate his claims. *Id.* at 494. We perceive no difference in the utility of the exclusionary rule where an opportunity is frustrated because of an inadequate procedural mechanism or where an opportunity is frustrated because of the manner in which the mechanism is applied. In either instance, the consequence to the defendant is the same: an opportunity to litigate the claim has been denied because of a procedural shortcoming.

Similarly, we decline to adopt the petitioner's interpretation of *Stone*. We believe that a limited inquiry into the correctness of state court decisions, occurring as a matter of course in the district courts, would be inconsistent with *Stone*. *Id.* at 493 n.35. The language of *Gamble*, however, entails an examination of each state decision which precipitates a habeas petition. This case by case review is inconsistent with *Stone's* assumption that state courts are as capable of deciding fourth amend-

ment issues as federal courts. When a petitioner alleges egregious error in the application of fourth amendment principles, of a magnitude and nature similar to the state court error present in *Gamble*, however, a federal habeas court might be justified in concluding that an opportunity for a full and fair hearing had not been afforded the petitioner.

In our view, *Stone* and *Moore v. Cowan, supra*, require a district court to make two distinct inquiries in habeas proceedings. Initially, the district court must determine whether the state procedural mechanism, in the abstract, presents the opportunity to raise a fourth amendment claim. *Williams v. Brown*, 609 F.2d 216, 220 (5th Cir. 1980). Second, the court must determine whether presentation of the claim was in fact frustrated because of a failure of that mechanism. *See Boyd v. Mintz*, 631 F.2d 247, 250 (3rd Cir. 1980); *Gates v. Henderson*, 568 F.2d 830, 840 (2nd Cir. 1977) *(en banc)*, *cert. denied*, 434 U.S. 1038 (1978).[3]

The mechanism provided by the State of Ohio for the resolution of fourth amendment claims is, in the abstract, clearly adequate. Ohio R. Crim. P. 12 provides

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3 Of course, petitioner's opportunity to raise his claim may be legitimately frustrated by the state's procedural mechanism. For instance, the harmless error doctrine may legitimately frustrate the petitioner's claim by rendering his fourth amendment claim immaterial. *E.g. Moore v. Cowan*, 560 F.2d 1298, 1302 (6th Cir. 1977). Similarly, an independent and adequate state procedural ground may also legitimately serve to frustrate the petitioner's opportunity to raise a fourth amendment claim. *E.g., Gates v. Henderson*, 568 F.2d at 840. *See also Wainwright v. Sykes*, 433 U.S. 72 (1977).

an adequate opportunity to raise fourth amendment claims in the context of a pretrial motion to suppress, as is evident in the petitioner's use of that procedure. Further, a criminal defendant, who has unsuccessfully sought to suppress evidence, may take a direct appeal of that order, as of right, by filing a notice of appeal. *See* Ohio R. App. P. 3(A) and Ohio R. App. P. 5(A). These rules provide an adequate procedural mechanism for the litigation of fourth amendment claims because the state affords a litigant an opportunity to raise his claims in a fact-finding hearing and on direct appeal of an unfavorable decision. *See O'Berry v. Wainwright,* 546 F.2d 1204, 1213 (5th Cir. 1977).

The second part of the analysis addresses the problem here. The state appellate court held that the petitioner lacked standing to raise the fourth amendment claim. The parties did not brief or argue this issue, and it was not raised in the trial court.[4] The state appellate court, in its opinion, did not discuss or apply the rule of *Jones v. United States,* 362 U.S. 257 (1960), which had not yet been overruled by *United States v. Salvucci,* 448 U.S. 83 (1980). The Court in *Jones* held that a person, charged with an offense involving possession of contraband as one of its elements, need not show that he had standing to challenge the search.[5] *Id.* at 263-64. The state appellate

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4 *See State v. Morris,* 42 Ohio St. 2d 307, 329 N.E.2d 85 (1975) (Syllabus No. 1) (state's failure to raise standing amounts to a waiver).

5 The petitioner was convicted of one count of aggravated trafficking, Sec. 2925.03 (A) (6) of Ohio Rev. Code Ann.; one count of trafficking in marijuana, Sec. 2925.03 (A) (6) of Ohio Rev. Code Ann.; and three counts of drug abuse, Sec. 2925.11 (A) of Ohio Rev. Code Ann. Possession is a necessary element of each of these offenses. Further, the district court found, and the respondent does not dispute the finding, that petitioner does have standing to raise the fourth amendment claim.

court's failure to apply *Jones* made inquiry into the petitioner's standing necessary. After reviewing the transcript of the hearing, the appellate court concluded that because there was no evidence indicating that the petitioner had standing to challenge the search, it could not rule on the merits of the claim. While failure to apply the rule was perhaps understandable, the petitioner's reliance upon the rule was equally understandable, and the petitioner's reliance upon *Jones* in the trial court resulted in his failure to prove that he actually had standing.

We do not believe that the appellate court's failure to apply *Jones* denied the petitioner an opportunity for full and fair litigation, because its action may have been warranted in light of intervening decisions. *United States v. Hunter*, 550 F.2d 1066, 1072 (6th Cir. 1977). We believe, however, that the state appellate court frustrated the petitioner's opportunity to litigate his fourth amendment claims because it failed to remand the case to the trial court to allow the petitioner to establish his standing to challenge the search. Although such a remand is often not necessary, *e.g., United States v. Hunter, supra*, the record in this case indicates that the petitioner could have proven his standing to challenge the search[6] had he an-

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6 For example, questioning of the police officers indicated that the petitioner rented the apartment. Further, Officer Keith Baird indicated that "it was pretty common knowledge where he [the petitioner] lived for the last year," during trial, in response to an inquiry into the identity of the apartment's tenant. This record presents a situation which is decidedly different from cases such as *United States v. Hunter, supra*. In *Hunter*, the absence of standing was clear from the record before this court. Here, however, the Ohio Court of Appeals indicated that it would not rule on the merits of the petitioner's claim because Riley's standing was not clear from the record.

ticipated the appellate decision. Further, we believe that the petitioner's reliance upon *Jones* was justified, and that requiring him to anticipate the need to prove his standing in the trial court would be unreasonable. Consistent with our conclusion is the Supreme Court's disposition in *United States v. Salvucci*, 448 U.S. 83 (1980). In *Salvucci*, which finally overruled *Jones*, the Court remanded the case to allow the defendant to prove that he had "a legitimate expectation of privacy," for many of the same reasons we have just outlined. 448 U.S. at 95.

In sum, we believe that the district court's interpretation of *Stone* must be affirmed. We reach this conclusion, despite the facial adequacy of Ohio's procedural mechanism, because we believe that the procedure was applied in a manner that, through no fault of the petitioner, deprived him of an opportunity to fully litigate his claim. We hold that federal habeas relief is available when a criminal defendant is not allowed to fully present his fourth amendment claim in the state courts because of unanticipated and unforeseeable application of a procedural rule which prevents state court consideration of the merits of the claim.

Because we believe that the district court applied *Stone* correctly, we must review its decision on the merits of the petitioner's claim. The district court viewed the search, quite correctly, as warrantless, because a warrant was not obtained until after the contraband had been discovered. Warrantless searches are *per se* unreasonable under the fourth amendment, subject to only a few exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). Thus, the search of the petitioner's apartment is not valid unless the circumstances fit into one of the exceptions to the general warrant requirement.

The respondent relies upon the "consent" exception to the warrant requirement. He argues that Christian's consent allowed the police to search the petitioner's apartment, and that Christian's consent was knowingly and freely given. *Schneckloth v. Bustamonte*, 412 U.S. 218, 223 (1973); *Vale v. Louisiana*, 399 U.S. 30, 35 (1970). In order for the consent to be valid, the person giving the consent must have the authority to do so, *Stoner v. California*, 376 U.S. 483, 489 (1963), and the consent must be voluntarily given. *Schneckloth*, 412 U.S. at 223.

We believe Christian's consent was not valid because he lacked authority to permit a search of the apartment. A person may consent to a search if he possesses "common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171 (1974). The touchstone of common authority is "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that others have assumed the risk that one of their number might permit the common area to be searched." *Id.* at 171 n.7. With these factors as the focus of our analysis, we shall examine the extent of Christian's authority.

Christian did not live in the petitioner's apartment. Although he had known the petitioner for several years, he was not a regular visitor to the apartment and, except for the night of the shooting, he never had possession of the keys to the apartment. Finally, Christian testified that he did not have permission to enter the apartment when the petitioner was not there. The petitioner corroborated this testimony, and the respondent did not dispute it. In light of this testimony, we agree with the

district court's conclusion that Christian lacked authority to consent to the search. He had no right to use the property and did not have access or control for any purpose. Moreover, we refuse to infer that the petitioner "assumed the risk" that Christian would consent to a search merely by inviting Christian into his home. We hold that Christian was without authority to consent to the search of the petitioner's apartment and, therefore, that the warrantless search and subsequent seizure of the contraband was unlawful.[7]

Finally, the respondent argues that the deterrent purpose of the exclusionary rule would not be served by the suppression of the evidence seized in this case, because the officers had a reasonable, good faith belief that Christian had authority to consent to the search and that the search was lawful. Essentially, the respondent asks us to adopt the rule and rationale of *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) *(en banc), cert. denied*, 449 U.S. 1127 (1981). The Fifth Circuit in *Williams* considered the underlying purpose of the exclusionary rule and concluded that the exclusionary rule serves no deterrent purpose when the police illegally seize evidence because of a reasonable, good faith belief that they have acted properly. *Id.* at 847. Because we have concluded that the officers' belief that the search was proper was unreasonable under the circumstances, we need not decide whether such an exception exists. *See United States v. Downing*, 665 F.2d 404 (1st Cir. 1981).

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7 The respondent also argues that Christian had apparent authority to consent to the search because his possession of the keys caused the police officers to reasonably believe that he, in fact, possessed the requisite authority. This contention can be summarily dismissed. *Stoner v. California*, 376 U.S. 483, 488 (1964).

The officers' belief that Christian's implicit consent permitted them to enter the apartment was unreasonable. The only objective fact which ordinarily might suggest that Christian had authority to consent is his possession of the apartment key. Officer Heinrichs, Deputy Harrow, and Chief Watson testified that they did not know who lived in the apartment. Watson testified that he did not ask Christian whether the apartment belonged to him and that, to his knowledge, no one else asked that question. Harrow indicated that he was unaware whether permission for the search had even been given at all. The law is reasonably clear that there must be some sort of connection between the person consenting to the search and the area to be searched. *United States v. Matlock,* 415 U.S. at 171 n.7. Thus, the extent of Christian's dominion over the apartment was vital to his capacity to consent to the search. The failure of the police to inquire into that subject is unreasonable. If we were to hold that this course of conduct supports an objectively reasonable belief, then we would, in effect, be condoning deprivations of constitutional rights which are the result of negligent police conduct. Moreover, if we held that the police had a reasonable belief, we would, in effect, encourage the police to avoid inquiring into the facts of the situation. The exclusionary rule is designed to deter negligent, as well as wilful, deprivations of constitutional rights. *Michigan v. Tucker,* 417 U.S. 433, 447 (1974). Therefore, the failure to suppress evidence which is improperly obtained primarily because the police failed to inquire and ascertain the operative facts would be inconsistent with the deterrent purpose of the exclusionary rule.

The judgment of the district court is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C 79-280

JOSEPH RILEY,

Petitioner,

vs.

FRANK H. GRAY,
Superintendent, Ohio State Reformatory,

Respondent.

MEMORANDUM & ORDER

FILED, January 9, 1980, 4:35 p.m.

Carr, Magistrate:

This is a petition for a writ of habeas corpus, filed by the petitioner pursuant to 28 U.S.C. Section 2254. On October 11, 1979, this case was referred for a Magistrate's Report and Recommendation. Upon review of the entire file and the pleadings and arguments of the parties, it appears that review of this petition is not barred by the doctrine of *Stone v. Powell*, 428 U.S. 465 (1976). It further appears that, before a final determination of petitioner's claim can be made, an evidentiary hearing should be held.

In conformity with Rule 77(d) F.R.C.P. please take notice that the following order of judgment was entered in this Court on: January 10, 1980
James S. Gallas, Clerk

Petitioner seeks habeas corpus relief on the basis that evidence used to convict him of various narcotics offenses, for which he is presently in the respondent's custody, was seized in violation of his rights under the fourth amendment to be free from unreasonable searches and seizures. The record shows that petitioner moved to suppress this evidence in the trial court, and after a hearing the motion was denied. On appeal, the state appellate court ruled sua sponte that petitioner had failed to prove his standing at the suppression hearing, and thereupon overruled the assignment of error without reviewing or ruling on the merits of the petitioner's fourth amendment claims. The court of appeals considered other claims (not at issue in this case) raised by the petitioner, and affirmed the conviction. The Supreme Court of Ohio overruled petitioner's motion to that court for leave to appeal. A state court post-conviction petition was unsuccessful. Thus, petitioner has exhausted his state court remedies.

## I. Stone v. Powell

The threshhold question in this case is whether the petitioner had a full and fair opportunity to litigate his fourth amendment claim in the state courts, in light of the decision of the state court of appeals that petitioner lacked standing, and its failure to address the merits of the petitioner's claims that the seizure of the narcotics was unconstitutional. This threshold question can be stated as follows: where a defendant has a full suppression hearing in the trial court, but is denied the opportunity for a decision by state reviewing courts, can he obtain habeas corpus review despite the restrictions imposed by *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037 (1976).

At the outset, it should be noted that the state appellate court disregarded applicable Ohio law when it

ruled sua sponte that petitioner lacked standing. The record shows that the prosecutor never contended that the petitioner was without standing. Under *State v. Morris,* 42 Ohio St. 2d 307, 329 N.E. 2d 85 (1975) (syllabus), where no challenge to standing is raised in the trial court, the prosecution is deemed to waive any objections to standing. Thus, even if the state had raised the standing question for the first time on appeal, the appellate court could not, under prevailing Ohio law, consider or rule on the question.

Moreover, it appears that the determination by the state appellate court that the petitioner lacked standing was erroneous under controlling Supreme Court decisions. The record shows that petitioner was charged and convicted of possessing controlled substances. Where possession is an essential element of the offense, the defendant is deemed to have "automatic" standing under *Jones v. United States,* 362 U.S. 257, 80 S. Ct. 725 (1960); *State v. Morris,* 42 Ohio St. 2d 307, 329 N.E. 2d 85 (1975). *See generally* 2 LaFavre Search and Seizure section 11.3(g) (1978). In addition, though not specifically disclosed at the suppression hearing (presumably because of the prosecutor's failure to challenge petitioner's standing), the trial record makes clear (Tr. 129), and it is undisputed in the instant case that the premises searched were occuped by the petitioner as his residence. In such circumstances petitioner's standing is clear. See *id.* section 11.3(a); *State v. Keeling,* 182 N.E. 2d 60 (C. P. Cuyahoga Cty. 1962).

In sum, petitioner's fourth amendment claim cannot be overcome in this court, nor could it be properly overruled in the state courts, on the basis that he lacked standing. In reaching its result, the state court of appeals disregarded applicable state procedural principles, see *Morris, supra,* and federal and state decisions which make petitioner's standing clear.

Nonetheless the question remains: Was *Stone v. Powell* satisfied by the full suppression hearing in the state trial court? In *Stone,* the Supreme Court held:

> Where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. 428 U.S. at 482, 96 S. Ct. at 3046.

With reference to the issue in the instant case – whether "full and fair litigation" requires an opportunity for a decision in a reviewing court, as well as in the trial court – the Court suggested in a footnote that an opportunity for appellate determination of the merits of a fourth amendment claim was a component of the requisite "full and fair litigation":

> We hold only that a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review. 428 U.S. at 495, 96 S. Ct. at 3053 n.37.

Elsewhere in its opinion, the Court makes additional mention of consideration of claims at trial and on direct review. See 428 U.S. at 486, 489, 96 S. Ct. at 3048, 3050.

In the relatively few cases which have considered the question of the need for an opportunity for appellate review, federal courts have consistently held that to fulfill the "full and fair litigation" requirement of *Stone*, the states must allow determination at two levels. *Gamble v. Oklahoma*, 583 F.2d 1161 (10th Cir. 1978); *Mack v. Cupp*, 564 F.2d 898 (9th Cir. 1977); *Pulver v. Cunningham*, 419 F. Supp. 1221 (S.D. N.Y. 1976). Thus, the prevailing approach appears, as stated in *Pulver*, to be:

> that the opportunity to litigate encompasses more than an evidentiary hearing in the trial court. That is, it includes that corrective action available through the appellate process on direct review of the judgment of conviction. 419 F. Supp. at 1224.

In *Moore v. Cowan*, 560 F.2d 1298, 1301 (6th Cir. 1977), the Sixth Circuit has stated that a state appellate court must "take cognizance of the constitutional claim and render a decision in light thereof." *Moore* indicates that a state reviewing court need not expound upon a fourth amendment claim where it can be determined that the violation was harmless beyond a reasonable doubt. 560 F.2d at 1302.

On the record in the instant case, it cannot be said that the state court of appeals took cognizance of the constitutional claim and rendered a decision in light thereof, in view of that court's failure to follow state procedural requirements and controlling state and federal standing principles. Thus, it is apparent that, if directly presented with the issue in this case, the Sixth Circuit would adopt the approach of other federal courts and hold that *Stone v. Powell* does not restrict federal

habeas corpus review of the petitioner's claims in this case. Moreover, it is clear that the violation of petitioner's fourth amendment rights, if established, was not harmless.

## II. Evidentiary Hearing

From the transcript of the suppression hearing it appears that petitioner's apartment was subjected to three distinct intrusions:

1. By Officer Heinrichs, in response to his request to James Christian to see the gun (Tr. 7-8, 17-22);
2. By Officer Heinrichs and Chief Watson (Tr. 10-12, 23-25, 33-34); and
3. By Officer Heinrichs and Deputy Harrow "to process the crime scene." (Tr. 12-15, 45-58).

The state contends that none of these intrusions required a prior search warrant because the record shows consent by James Christian.

The record developed at the suppression hearing shows, at most, however, that Christian's consent (assuming he (a) could and (b) did in fact consent) was responsive to direct and specific questions by Officer Heinrichs: "Where is the gun?" . . . I want to see it." (Tr. 7) This purpose was accomplished by the brief, only slightly intrusive first entry into the apartment (Tr. 8).

The present record, aside from reference to the fact that Christian accompanied Chief Watson and Officer Heinrichs when the second entry occurred (Tr. 10), contains no evidence regarding a further request for per-

mission to enter the apartment. By the time Deputy Harrow returned to conduct his investigation of the crime scene, Christian had left with Chief Watson (Tr. 34). It would not appear, therefore, that Christian consented to this activity, during which most, if not all of the narcotics were discovered (Tr. 46-51).

With reference to Christian's consent, the following questions appear pertinent:

1. Did Christian have actual authority from the petitioner to consent to the entry of others to petitioner's apartment?
2. If not, did he exhibit such apparent authority that the officers reasonably could conclude that he could consent to their entry?
3. Was Christian's consent voluntary in light of the totality of the circumstances?
4. What was the scope of the consent, assuming such was voluntarily given?

It does not appear from the record of the suppression hearing that sufficient evidence has been developed to enable this court to ascertain the answers to all of these questions. Therefore, an evidentiary hearing directed to developing such further evidence as the parties desire to submit concerning these four questions shall be held.

In denying suppression, the state trial court relied, in part on the fact that Deputy Harrow was investigating a crime scene when he observed the narcotics. Respondent has not addressed petitioner's arguments that no crime scene exception to the warrant requirement exists in

Ohio, or could exist under the prerequisites for an "exigent circumstances" search. It is unclear whether respondent concedes the validity of petitioner's arguments on this question. In light of such decision as *United States v. Mayes,* 518 F.2d 675, 678 (6th Cir. 1975), a concession that the entries into petitioner's apartment were not made in circumstances of exigency might be understandable. To enable a final determination of all questions, however, the respondent may, if he desires to do so at the evidentiary hearing, submit additional evidence concerning the existence of exigency beyond the evidence in the present record.

Therefore, for the foregoing reasons, it is hereby

ORDERED

That an evidentiary hearing will be held in Room 317B, United States Courthouse and Customshouse, Toledo, Ohio, on a date and at a time to be determined by the United States Magistrate.

So ordered.

/s/ James G. Carr
James G. Carr
United States Magistrate

Toledo, Ohio
January 9, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C 79-280

JOSEPH RILEY,

Petitioner,

vs.

FRANK H. GRAY, Supt.,

Respondent.

OPINION and ORDER

FILED, September 5, 1980, 11:49 a.m.

WALINSKI, J:

This cause came on for an evidentiary hearing on petitioner's claim that his Fourth Amendment rights were violated by an illegal search and seizure, resulting in his conviction for a possession offense involving controlled substances. The respondent vigorously opposes petitioner's claim.

The circumstances surrounding the events leading to the necessity for police searches are unusual.

Petitioner occupied an apartment over a tavern known as the Owl Bar in Paulding, Ohio. On the day in question, petitioner and several friends gathered at his apartment preparing to go shooting. Among the friends was one James Christian who, in the course of examining and preparing a handgun, caused it to discharge, striking the petitioner. The companions transported the peti-

tioner to the bar below, and called an ambulance and police. The shooting affected Christian to the point he was nauseous and vomiting.

When the police officer arrived, he asked Christian where the weapon in question was located. Christian, who had removed petitioner's keys, took the officer up to the apartment and handed him the keys. The officer unlocked the door, saw the weapon on a table, locked the door, and went back down to the bar to await his superiors.

When the Chief and another officer arrived, the three went back to the apartment, unlocked it, and began to examine the scene of the shooting. In the course of searching for the bullet, they noticed a hole in a wall and entered the next room to follow its course. In plain view on a dresser several suspicious articles were observed.

After consultation, the officers left the apartment for the purpose of obtaining a search warrant for the entire premises. After obtaining the search warrant, the officers returned to the apartment to search further and found what turned out to be controlled substances, leading eventually to petitioner's conviction. Christian was never brought to trial on the shooting incident.

Prior to trial, the trial court held a suppression hearing on petitioner's unlawful search and seizure claim, and overruled the motion to suppress. Since the record of the suppression hearing was minimal and the appellate court did not specifically address the Fourth Amendment claim, this Court, on the recommendation of the United States Magistrate, James Carr, granted an evidentiary hearing so that petitioner's Fourth Amendment claim would receive full consideration.

Respondent Gray raises as a basic issue the "standing" of the petitioner to challenge the seizure of contraband in petitioner's absence, citing *Stone v. Powell*, 428 U.S.C. 465 (1976).

This Court adopts the conclusion of the United States Magistrate and makes an independent finding that seizure of contraband which is later used in a possession prosecution can raise a Fourth Amendment challenge. In the *Powell, supra,* fact situations, both defendants had appellate review of their Fourth Amendment challenges. This Court will not go so far as to say that at least a two-step state court review is mandated by *Powell,* but under the unusual facts of this case, the evidentiary hearing to protect the petitioner's Fourth Amendment rights was warranted.

Under the exigent circumstances and the fact that the investigating officers had a duty to protect the scene of the shooting as a possible attempted homicide, the Court finds the first officer, acting under the apparent though non-existent authority of Christian to permit entry, made a reasonable and non-obtrusive look at the weapon, then awaited his superiors. This Court holds that the officer had probable cause to search the scene of the alleged crime. *Kirvelaitis v. Gray,* 513 F.2d 213 (6th Cir. 1975).

The second entry by the authorities, who were in possession of petitioner's keys from Christian, was with probable cause for the purpose of gathering evidence about the shooting and the weapon. When the officers saw contraband not related to the shooting, the officers did the proper thing in obtaining a search warrant for the entire premises before seizing the contraband.

Thus, the Court concludes that petitioner's Fourth Amendment rights were not violated. *Powell, supra; Kirvelaitis, supra,* and the recent decisions on similar subjective search problems, *United States v. Salvucci,* _____U.S._____, 27 Cr. L. 3241 (6/25/80); *Rawlings v. Kentucky,* _____U.S._____, 27 Cr. L. 3245 (6/25/80).

For the foregoing reasons, and that reasoning set forth in the Magistrate's recommendation, the petition is hereby dismissed with prejudice.

IT IS SO ORDERED.

/s/ J. Walinski
United States District Judge

Toledo, Ohio.
September 5, 1980.

In conformity with Rule 77(d) F.R.C.P. please take notice that the following order of judgment was entered in this Court on: September 5, 1980
James S. Gallas, Clerk

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

**No. C 79-280**

**JOSEPH RILEY,**

**Petitioner,**

**vs.**

**FRANK H. GRAY, Supt.,**

**Respondent.**

**OPINION and ORDER**

**FILED, January 22, 1981, 1:51 p.m.**

WALINSKI, J:

This cause came to be heard on Petitioner Joseph Riley's motion for relief from judgment pursuant to Rule 60(b)(1) and (6) of the Federal Rules of Civil Procedure. Subsequently petitioner filed a motion to amend his motion for relief from judgment to state that said motion was also brought pursuant to Rule 59(e). For good cause shown, said motion to amend is hereby granted.

Petitioner filed his petition for a writ of habeas corpus pursuant to 28 U.S.C. section 2254, which was referred to the Magistrate for a Report and Recommendation on October 11, 1979. On the recommendation of the United States Magistrate, James Carr, this Court granted an evidentiary hearing so that petitioner's Fourth

Amendment claim would receive full consideration. The evidentiary hearing was held on August 12, 1980, and this Court's order denying the petition for a writ of habeas corpus was filed on September 5, 1980.

Petitioner's present motion for relief from judgment specifically questions the fact pattern upon which this Court's decision was based. On reconsideration the Court finds that petitioner's motion is well taken and will accordingly state the corrected fact pattern and the legal consequences which flow therefrom.

Petitioner occupied an apartment over a tavern known as the Red Owl Bar in Paulding, Ohio. On September 29, 1976, the Paulding Village Police arrived at the entrance of the tavern in order to investigate the report of a shooting. Officer Walter Heinrichs found petitioner lying in the front doorway, losing blood from a gunshot wound. At the direction of the tavern owner, Officer Heinrichs proceeded to the lavatory where he found Mr. James Christian being physically sick in one of the stalls. Mr. Christian explained to the officer that he had shot petitioner by accident, and at that point Officer Heinrichs asked to see the gun that Christian had used.

Mr. Christian led Officer Heinrichs to the second floor apartment. There was only one entrance to this apartment which was locked. Christian, who had removed petitioner's keys, was shaking too hard to open the door so he handed the keys to Heinrichs. Heinrichs unlocked the door and took about two steps inside the apartment where he observed a revolver on the kitchen table. He looked quickly around the apartment and then left, locking the door and keeping the keys.

Very soon afterwards Chief of Police Charles Watson arrived at the scene whereupon the officers entered the apartment for a second time and again viewed the gun on the table and observed blood on the carpet. The officers again left the apartment and locked the door. The Chief then ordered his men to send for the mobile evidence van so they could process the crime scene. The mobile evidence van arrived shortly thereafter and the officers conducted an on the site investigation of the shooting during which physical evidence including other guns, suspected marihuana and drugs were found.

After consultation, the officers left the apartment for the purpose of obtaining a search warrant for the entire premises. After obtaining the search warrant, the officer returned to the apartment and seized what turned out to be controlled substances, leading eventually to petitioner's conviction.

The Fourth Amendment proscribes all unreasonable searches and seizures. Warrantless searches are *per se* unreasonable under the Fourth Amendment subject to only a few exceptions. *Katz v. United States,* 389 U.S. 347 (1967). A recent Supreme Court decision has dealt with the "crime scene" exception which respondent has relied on in this case.

In *Mincey v. Arizona,* 437 U.S. 385 (1978), the Supreme Court ruled that Arizona's "murder scene exception" to the warrant requirement was inconsistent with the Fourth and Fourteenth Amendments. In that case an undercover officer was shot and killed and two other persons were wounded during a narcotics raid on petitioner's apartment. The narcotics agents looked about quickly for other victims but refrained from further investigation, merely guarding the suspects and

the premises. Within ten minutes, however, homicide detectives arrived and took charge of the investigation. They conducted a warrantless search which lasted four days.

The Arizona Supreme Court held that the warrantless search of a homicide scene is permissible under the Fourth and Fourteenth Amendments. The United States Supreme Court rejected this argument and stated that:

> Except for the fact that the offense under investigation was a homicide, there were no exigent circumstances in this case * * * * There was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant. Indeed, the police guard at the apartment minimized that possibility. And there is no suggestion that a search warrant could not easily and conveniently have been obtained. We decline to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search.

*Id.* at 394.

Thus there is no "crime scene" exception which would justify the warrantless search in this case. The first entry can be justified on the emergency exception to the warrant requirement. However, a warrantless search must be limited to only the exigencies upon which it is based. Certainly after the second entry it was clear that there were no other victims or assailants in the apart-

ment. The person who shot petitioner was known and was being detained by the police. There was no indication that evidence would be removed or destroyed, and there were plenty of police officers present to guard the apartment until a search warrant could be obtained. Therefore, the third entry and search, in which the narcotics were discovered, was impermissible under *Mincey*. In a most recent case the Sixth Circuit has specifically applied *Mincey* to a warrantless search situation. *United States v. Montano*, 613 F.2d 147 (6th Cir. 1980). *See also, United States v. Mayes*, 518 F.2d 675 (6th Cir. 1975).

The only other justification advanced by defendant for the warrantless search is that Mr. Christian consented to the search. It was clear from the hearing that although Mr. Christian may have appeared to have had authority to permit entry because he had possession of the keys, he had no actual authority. Therefore, the warrantless search cannot be justified on the basis of consent. *United States v. Matlock*, 415 U.S. 164 (1974); *United States v. Cook*, 530 F.2d 145 (7th Cir. 1979).

Since there is no valid exception to the warrant requirement in this case, the evidence seized in the warrantless search should have been suppressed.

For the foregoing reasons, and that reasoning set forth in the Magistrate's recommendation,

IT IS ORDERED that petitioner's motion for relief from judgment should be, and hereby is, granted.

IT IS FURTHER ORDERED that the petition should be, and hereby is, granted.

/s/ J. Walinski
United States District Judge

Toledo, Ohio.
January 22, 1981

In conformity with Rule 77(d) F.R.C.P. please take notice that the following order of judgment was entered in this Court on: January 22, 1981

James S. Gallas, Clerk

## IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

**STATE OF OHIO, PLAINTIFF–APPELLE, v. JOSEPH RILEY, DEFENDANT–APPELLANT**

**MEMORANDUM OPINION**

(No. 11-77-7 - Decided January 20, 1978)

APPEAL: Court of Appeals for Paulding County.

MR. J. DAVID WEBB, Prosecuting Attorney, for Appellee.

MR. RALPH DeNUNE III, for Appellant.

GUERNSEY, J. Appellant was indicted, tried and convicted in the Court of Common Pleas of Paulding County for the crimes of aggravated trafficking in drugs in violation of R.C. 2925.03(A)(6), trafficking in Marijuana in violation of R.C. 2925.03(A)(6) and of drug abuse in violation of R.C. 2925.11(A). He appeals assigning error in three particulars.

*First Assignment of Error.* "Denial of defendant-appellant's motion to suppress constituted prejudicial error since the warrant for the search of the defendant-appellant's house was not obtained until after the police had entered and searched the premises in violation of the defendant-appellant's rights under the fourth and fourteenth amendments to the United States Constitution."

On January 21, 1977, defendant filed his pre-trial motion "for an order suppressing all evidence seized by police authorities on or about the 29th day of September, 1976, from defendant's residence located at 117-1/2 W. Perry Street, Apt. 2, Paulding, Ohio," for the asserted reason that the warrant upon which seizure was made

was based on the affidavit of one Harrow upon information received by him as the result of a "warrantless, unreasonable search."

We are limited in our review of this motion and the ruling thereon to the transcript of the hearing on the motion where evidence was adduced that upon answering a police call Police Officer Heinrichs of the Village of Paulding found the defendant lying in the Red Owl Tavern with a gunshot wound in his body; that he inquired who did it and was directed to a restroom where he found one James Christian vomiting; that he asked Christian where the gun was and Christian said, "It's upstairs," and upon Christian being told that the officer wanted to see it, they proceeded out the door and up the stairs to a second floor apartment, and that Christian voluntarily unlocked and opened the door and they took about two steps inside the apartment and the officer saw a weapon lying on the table. There was further evidence adduced at the hearing on the motion that they left the apartment, secured the door, descended the stairs where the officer turned the keys over to the chief of police who momentarily visited the apartment after first placing Deputy Sheriff Harrow in charge of the on the site investigation; that Heinrichs, Christian and Harrow returned to the apartment where an on the site investigation of the shooting took place and physical evidence including other guns, suspected marijuana and drugs were found and seized.

Heinrichs was asked whether he knew "that this apartment upstairs belonged to one Joseph Riley," and "You didn't know that Joe Riley lived there." To each of these questions, which assumed facts not proved, Heinrichs answered in the negative, and the chief of

police was also asked whether he had "Joe Riley's permission to enter the apartment," which he also answered in the negative.

There was no evidence whatever adduced at the hearing on the motion to suppress of defendant Riley's connection with the apartment except that he was shot there, nor was there any evidence as to ownership or possession of the seized articles. On this state of the evidence the trial court overruled the motion to suppress the seized physical evidence.

The Fourth Amendment to the Constitution of the United States, extended by the operation of the Fourteenth Amendment to state criminal prosecutions, prescribes among other things:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated * * * * ."

Basic to the existence and enforcement of the constitutional right to be secure against unreasonable searches and seizures is the possessive, "their," connoting ownership, or at least the right of possession, of the "houses, papers and effects," and a person who has no ownership or right of possession of the premises inolved has no standing to claim the unreasonableness of the search and seizure.

In a pre-trial hearing of a motion to suppress evidence on the ground that it was illegally obtained the burden of proof or the burden of persuasion as to the matter of standing of the movant to claim the right which he seeks to enforce is upon the movant. Compare State

v. Kassow, 28 Ohio St. 2d 141, where in the third paragraph of the syllabus the Supreme Court held that upon the trial of the issues raised by a pre-trial motion to suppress a statement claiming that the statement was compelled by mistreatment, threat of disadvantage, or hope of reward, the burden is upon the movant to prove his claim in that respect.

Accordingly, there being no proof whatever that the defendant had any ownership or possessory interest in the apartment where the seized articles were found, he has not proved any standing to have their use in evidence suppressed and his first assignment of error is without merit. We find this independently of the possibility of the legality of the search due to the consent of Christian who exercised some dominion over the apartment. See Frazier v. Cupp, 394 U.S. 731, 89 S. Ct. 1420. Nor do we pass upon its reasonableness otherwise.

*Second Assignment of Error.* "Denial of defendant-appellant's motion in limine constituted error that seriously prejudiced defendant-appellant in the eyes of the jury, as it placed before them evidence of a crime for which the defendant-appellant was not charged, and which was neither relevant nor material to the issues at trial."

This assignment has reference to an oral motion made at the outset of trial claimed by defendant to be a request "that the State refrain from making any reference to the firearms in question, and that the firearms seized from Defendant-Appellant's home not be brought into the presence of the jury." The defendant further asserts that the motion was denied and the automatic weapons were brought before the jury and remained before them during the entire course of the proceedings.

Prior to the morning of trial defendant had also stood charged by indictment for the crime of possession of an automatic firearm in violation of R.C. 2923.17 but this charge was dismissed on the morning of trial for lack of timely prosecution.

Notwithstanding the assertions of the defendant the transcript of proceedings discloses at page 40 that the only motion made was "regarding any further questions by Mr. Webb going to the weapon or to the drugs that were found in the apartment on September 29, 1976, for the reason that we feel they were irrelevant to the matters at hand." No motion was made "that the firearms seized from Defendant-Appellant's home not be brought into the presence of the jury." The trial court overruled the motion and stated in further explanation, "I expect the officer to tell what was found. If, at the time he concludes his testimony, if you wish to have some ruling as to what part is relevant to the charges before the Court, the Court will consider that at that time."

The transcript then reveals that the automatic and other weapons were referred to without objection on pages 61, 80, 81, 82, 89, 90 and 107, but it does not appear from the transcript that they remained before the jury during the entire course of the proceedings. They were not offered into evidence and the usual reference to them in the testimony was as being among the items found in the apartment and inventoried by the investigating officer.

It is true that the presence of these weapons in the apartment has little bearing on the specific offenses for which the defendant was tried and found guilty except to

the degree which such presence may bear on the defendant's culpable state of mind. However, defense counsel did not sufficiently reserve the issue of the references to the firearms and their presence before the jury for review. In any event, there was a mass of other incriminating evidence specifically relating to the offenses for which the defendant was tried and found guilty which supported the verdicts on such offenses and it does not affirmatively appear that the defendant was, or could have been, prejudiced by the references to or the presence of the weapons. We find the assignment of error without merit.

*Third Assignment of Error.* "Denial of defendant-appellant's motion to compel the state to elect between counts 1 and 2 of the indictment was prejudicial error, as those two (2) counts charge a single identical offense."

Counts 1 and 2 of the indictment are identical except that count 1 charges possession of lysergic acid diethylamide (LSD) whereas count 2 charges the possession of marijuana (sic). The defendant claims that a conviction on these two counts is contrary to R.C. 2941.25 (A) and moved, at the close of all the evidence, that the prosecution be required to elect between the two counts.

R.C. 2941.25(A) prescribes:

> "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

R.C. 2925.03(A)(6), under which each count was lodged, prescribes:

"(A) No person shall knowingly do any of the following:

" * * * *

"(6) Possess a controlled substance in an amount equal to or exceeding three times the bulk amount.

R.C. 2925.01, incorporating by reference R.C. 3719.01 and R.C. 3719.41, defines "controlled substances" as including lysergic acid diethylamide (LSD) and marijuana.

The Supreme Court has interpreted the application of R.C. 2941.25(A) in Maumee v. Geiger, 45 Ohio St. 2d 238, primarily on the basis of its earlier decision in State v. Botta, 27 Ohio St. 2d 196. It concludes that there may not be a conviction when the two offenses, though one offense is not included in the other, are for all practical purposes merged to prevent shotgun convictions, the lesser crime being merged into the major. The doctrine of merger, however, consists of "the penal philosophy that a major crime often includes as inherent therein the component elements of other crimes."

Notwithstanding that by the penalty provisions of R.C. 2925.03(C) the crime of possession of LSD in an amount equal to or exceeding the bulk amount becomes the major crime of aggravated trafficking whereas the crime of possession of marijuana in an amount equal to or exceeding the bulk amount remains the offense of trafficking, a crime of lesser degree, it would not be possible to prove the former crime except by proof of possession of LSD, or the latter except by proof of the possession of Marijuana. Each offense is based on differ-

ent conduct. It will likewise be observed that the statute proscribes the possession of "a controlled substance," not the possession of "controlled substances."

In our opinion the two offenses here charged of which defendant was convicted do not come within the scope of the provisions of R.C. 2941.25. This assignment of error is, therefore, without merit.

Finding no error prejudicial to the defendant, appellant herein, in any of the particulars assigned and argued, the judgment must be affirmed.

JUDGMENT AFFIRMED.

MILLER, P.J. and COLE, J., concur.

Office - Supreme Court, U.S.
FILED
AUG 11 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2343

# In the Supreme Court of the United States

**October Term, 1981**

JOHN W. SHOEMAKER, Chief,
Ohio Adult Parole Authority,
*Petitioner,*

vs.

JOSEPH RILEY,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RALPH DENUNE III
*Counsel of Record*
4405 Talmadge Road
Toledo, Ohio 43624
(419) 473-2922

JOHN F. POTTS
4334 W. Central Avenue
Suite 231
Toledo, Ohio 43615
(419) 537-0737
*Attorneys for Respondent*

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

## QUESTIONS PRESENTED

I. WHETHER A STATE PRISONER HAS BEEN DEPRIVED OF A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS FOURTH AMENDMENT CLAIM WHERE THE STATE COURT OF APPEALS DENIES SAID CLAIM AND REFUSES TO CONSIDER THE MERITS THEREOF FOR REASONS THAT WERE NEVER LITIGATED IN THE COURT BELOW IN DIRECT CONTRAVENTION OF STATE PROCEDURAL REQUIREMENTS AND A CONTROLLING DECISION OF THE UNITED STATES SUPREME COURT?

II. WHETHER LAW ENFORCEMENT OFFICERS COULD POSSIBLY HAVE BEEN ACTING IN GOOD FAITH WHERE THEY MADE THREE (3) WARRANTLESS ENTRIES INTO A HOME BASED UPON "CONSENT" OBTAINED FROM A PERSON WHO HAD JUST SHOT THE HOMEOWNER WHERE THE OFFICERS MADE NO ATTEMPT TO INQUIRE AS TO THE EXTENT OF THAT PERSON'S AUTHORITY OR CONTROL OVER THE PREMISES, AND WHERE THAT PERSON HAD NO ACTUAL AUTHORITY TO GIVE SUCH CONSENT?

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# In the Supreme Court of the United States

**October Term, 1981**

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JOHN W. SHOEMAKER, Chief,
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JOSEPH RILEY,
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---

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### DECISIONS BELOW

In addition to those decisions set forth in the Petition for a Writ of Certiorari, the Paulding, Ohio, Court of Common Pleas issued a decision denying Respondent's pre-trial motion to suppress in the form of a letter to counsel dated February 15, 1977 (A - 1).

## STATUTES INVOLVED

In addition to the constitutional provisions set forth in the Petition for a Writ of Certiorari, this case involves 28 U.S.C. Section 2254: State custody; remedies in Federal Courts. The verbatim text of this statute is reproduced in the Appendix.

## STATEMENT OF THE CASE

Respondent, Joseph Riley, would initially point out that the charge of carrying a concealed weapon (a violation of Ohio Revised Code Section 2923.12) was not dismissed prior to trial, contrary to what is asserted in the Petition for Certiorari. Rather, Riley was acquitted when the jury found him not guilty of that charge.

The operative facts are not in dispute. On September 29, 1976, the Paulding, Ohio, Village Police were called to the entrance of a tavern known as the Red Owl Inn to investigate the report of a shooting. Officer Walter Heinrichs found Joseph Riley lying in the front doorway, bleeding from a gunshot wound. At the direction of the tavern owner, Officer Heinrichs proceeded to the lavatory where he found Mr. James Christian vomiting in one of the stalls. Christian was pale, perspiring and visibly shaken when he emerged from the stall. Upon being questioned by the officer, he explained that he had shot Riley by accident in the apartment next door. Officer Heinrichs then demanded to see the gun that had been used.

At the officer's insistence, Mr. Christian led Heinrichs to an apartment on the second floor of the building next door to the tavern. The only entrance was locked. At the suppression hearing held before the Court of Common Pleas of Paulding County, Ohio, Heinrichs testified that

Christian voluntarily unlocked the apartment door and invited him to enter the premises. At trial, however, Officer Heinrichs admitted that Christian was so nervous and emotionally distraught that he took the keys away from Christian and opened the door himself. At the evidentiary hearing held before the United States District Court for the Northern District of Ohio, Western Division, Heinrichs' story was that Christian's hands were shaking so badly that Christian handed Heinrichs the key and asked him to open the door. In any event, there was no evidence adduced at any stage of the proceedings indicating that Christian had authority to give the police permission to enter, or that the police made any inquiry in that regard.

James Christian did not testify at the state court suppression hearing or at the trial on the advice of his counsel. He did, however, testify before the district court. His testimony was that Officer Heinrichs had asked him if he had a key to the apartment. Christian responded that he had Riley's keys. The officer then demanded the keys and proceeded to unlock the apartment door.

After unlocking the door, Officer Heinrichs stepped into the apartment and observed a revolver lying on a table a few feet inside of the apartment. He then left the premises and locked the door behind him, confiscating the keys.

By this time, Chief of Police, Charles Watson had arrived at the scene. Pursuant to his orders, officers entered the apartment for a second time to look at the weapon involved and also observed blood on the carpet. At this point, the Chief ordered his men to send for the mobile evidence van maintained by the Paulding County Sheriff's Department so they could "process the crime scene."

After the evidence van arrived, the officers entered the apartment for the third time and began a general search of the premises. No effort was made to obtain a search warrant, although there were at least five (5) officers present at the time and the premises had been secured.

During the state court suppression hearing, Deputy Dave Harrow, who was directing the collection of evidence, explained that "There was no need for a warrant. It was a crime scene." At the District Court evidentiary hearing, Harrow was again asked about the procedures followed. He explained that it never occurred to him to get a search warrant, "because it was a shooting and I was just going to process the crime scene."

After spending no less than two (2) hours in Riley's apartment "processing the crime scene" the officers discovered guns and a quantity of controlled substances. At that point the officers decided to obtain a search warrant. The officers then left the apartment, locked it behind them, and posted a guard at the door. They returned with a warrant to search the "premises believed to be occupied and/or controlled by one Joe Riley". During this fourth entry the officers seized the weapons and controlled substances which they had previously discovered during their third warrantless intrusion into Riley's home.

It is undisputed that Riley never gave consent for the police to enter his apartment. Further, there is nothing in the record of the state court proceedings indicating that Christian had come into possession of Riley's apartment keys with Riley's knowledge or consent. At the district court evidentiary hearing, it was established that Riley lived alone in his apartment and that he had never entrusted keys to anyone. After Riley had been shot, Christian and another companion helped Riley out of the

apartment, and brought him downstairs to the tavern next door. As they left, Christian picked up the apartment keys from the same table where he left the gun. It is undisputed that Riley had never given his keys to Christian, and there was no evidence presented at any time which indicated that Christian was authorized to have access to Riley's apartment.

The Paulding County Court of Common Pleas denied Riley's motion to suppress holding that the three (3) warrantless entries into Riley's apartment were justified because ". . . Defendant (Riley) had been seriously wounded by a shot from a .357 Magnum revolver in circumstances, the legitimacy of which could not be presumed. . ." and because of the fact that there had been a violation of Ordinance 484 of the Village of Paulding which prohibits the discharge of a firearm within the Village territorial limits (A - 1).

The case proceeded to jury trial on one count each of Aggravated Trafficking (Ohio Revised Code, Section 2925.03), Trafficking in Marijuana (Ohio Revised Code, Section 2925.03 (a) (6)), Drug Abuse (Ohio Revised Code, Section 2925.11 (A)) and Carrying a Concealed Weapon (Ohio Revised Code, Section 2923.12). Riley was found not guilty of the weapons charge and convicted on the drug offenses.

The conviction was appealed to the Court of Appeals for Paulding County, which is in the Third Appellate District of Ohio. On appeal the decision of the trial court was affirmed without the merits of Riley's Fourth Amendment claim having been addressed. Although possession was a material element of each offense for which Riley was convicted, and despite the fact that the prosecution never challenged Riley's standing to move to suppress at any point in any of the state court proceedings, the

Court of Appeals held, *sua sponte*, that Riley did not have standing to litigate the merits of the Fourth Amendment issues arising out of the warrantless search of his home. In so holding, the court reasoned that since there was ". . . no proof whatsoever that the defendant had any ownership or possessory interest in the apartment, where the seized articles were found, he has not proved any standing to have their use in evidence suppressed. . ." (PA - 34).

Although the Court of Appeals did mention that the search might possibly be justified on the basis of the alleged consent obtained from Christian, who, the court said, "exercised some dominion over the apartment" it did not so hold (PA - 34). Indeed, it would not have been possible for the court to hold that a valid consent had been given, since the state court record was devoid of any evidence to support the contention that Christian exercised any "dominion" whatsoever over Riley's apartment.

After exhausting his remedies under state law, Riley filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio, Western Division. The Petitioner herein filed a return of writ contending, in essence, that consideration of his claim was foreclosed by this court's holding in *Stone v. Powell*, 428 U.S. 465 (1976). On January 9, 1980, the magistrate issued a memorandum and order holding that consideration of Riley's Fourth Amendment claim was not barred by *Stone*, as Riley had not been afforded a full and fair opportunity to litigate his Fourth Amendment claims in the state courts (PA - 17-18).

On August 12, 1980 an evidentiary hearing was held before the district court. The Petitioner contends that this hearing was "the first time" any evidence was adduced

to indicate that James Christian had no authority to consent to the search of Riley's home. However, the prosecution has the burden of establishing the validity of any consent to search and no evidence was ever adduced in the state court proceedings to establish Christian's authority in this regard.

On September 5, 1980, the district court issued an opinion and order denying Riley's petition. From a perusal of that opinion, its was obvious that the district court had misapprehended the facts and Riley made a timely motion for reconsideration on that basis. On January 22, 1981 the district court granted the motion for reconsideration and issued a new opinion and order based upon the actual facts of the case. In its opinion, the district court reasoned as follows:

> "Thus there is no 'crime scene' exception which would justify the warrantless search in this case. The first entry can be justified on the emergency exception to the warrant requirement. However, a warrantless search must be limited to only the exigencies upon which it is based. Certainly after the second entry it was clear that there were no other victims or assailants in the apartment. The person who shot petitioner was known and was being detained by the police. There was no indication that evidence would be removed or destroyed, and there were plenty of officers present to guard the apartment until a search warrant could be obtained. Therefore, the third entry and search, in which the narcotics were discovered, was impermissible under *Mincey*."

The district court also rejected the contention that the warrantless searches of Riley's apartment could be justified on the basis of consent, in accordance with the well-

established rule that apparent authority to consent to a search is not sufficient where actual authority is lacking.

Petitioner herein appealed to the United States Court of Appeals for the Sixth Circuit from the judgment granting Riley's petition for a Writ of Habeas Corpus. In affirming the judgment of the district court, the Court of Appeals held that Riley had been denied an opportunity to litigate the issue of his standing to move to suppress in the state courts, as the parties had never briefed or argued the question in the state appellate court and the prosecution had waived any possible objection to Riley's lack of standing by failing to make an objection in the trial court, as required by state law. Had the point been raised by the prosecution at the pre-trial suppression hearing (as required by state law), it is clear from the record of the trial that Riley could easily have proved his standing to challenge the constitutionality of the warrantless search of his home (PA - 8-10).

The Court of Appeals also rejected the contention that the officers involved acted in good faith, holding that since the officers did not know who lived in the apartment and made no inquiry of Christian in that regard, their subjective belief that Christian had authority to give such consent was not reasonable under the circumstances. In so holding, the Court of Appeals reasoned as follows:

> ". . . the extent of Christian's dominion over the apartment was vital to his capacity to consent to the search. The failure of the police to inquire into that subject is unreasonable. If we were to hold that his course of conduct supports an objectively reasonable belief, then we would, in effect, be condoning deprivations of constitutional rights which are the result of negligent police conduct. Moreover, if we hold that the police had a reasonable belief, we would, in effect, encourage

the police to avoid inquiring into the facts of the situation. The exclusionary rule is designed to deter negligent, as well as wilful, deprivations of constitutional rights. *Michigan v. Tucker*, 417 U.S. 433, 447 (1974). Therefore, failure to suppress evidence which is improperly obtained primarily because the police failed to inquire and ascertain the operative facts would be inconsistent with the deterrent purpose of the exclusionary rule." (PA - 13)

This case was affirmed on March 22, 1982, and was thereafter appealed to this honorable court.

## REASONS WHY THE WRIT SHOULD BE DENIED

### I. REVIEW OF A FOURTH AMENDMENT CLAIM IN A HABEAS CORPUS PROCEEDING IS NOT PRECLUDED WHERE THE STATE PRISONER WAS DENIED A FULL AND FAIR OPPORTUNITY TO LITIGATE THAT CLAIM IN THE STATE COURTS

This case presents no issues of major significance to Fourth Amendment jurisprudence or the administration of criminal justice as a whole. The Court of Appeals made a proper application of *Stone v. Powell* and correctly decided that Riley had been deprived of a full and fair opportunity to litigate his Fourth Amendment claim in the state courts. *Stone*, of course, bars the litigation of Fourth Amendment claims in proceedings brought pursuant to 28 U.S.C. Section 2254 where the state prisoner has been afforded a full and fair opportunity to fully and fairly litigate those claims in the state courts. *Id.*, 428 U.S. at 494.

Where a prisoner has been denied a full and fair opportunity to litigate his Fourth Amendment claims at trial and on direct appeal, *Stone v. Powell, supra* does not operate to bar consideration of the claim in a habeas corpus proceeding *Id.*, 428 U.S. at 494, n.37:

> "We hold only that a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim, absent a showing that the state prisoner was denied an opportunity for a full and fair litigation on that claim at trial and on direct review."

It is well established that the exclusionary rule is not coextensive with the Fourth Amendment. The requirements of the Fourth Amendment include an opportunity for a full and fair hearing on issues relevant to a deprivation of Fourth Amendment rights. *Franks v. Delaware*, 438 U.S. 154, 171-172 (1978). In the case at bar, the Court of Appeals found that Riley had been unlawfully deprived of an opportunity to present his Fourth Amendment claim, and that he would have prevailed upon the merits had he been afforded a proper opportunity to litigate the issues.

In Ohio, the prosecution must object to an accused's standing to make a motion to suppress, or the issue is waived. *State v. Morris*, 42 Ohio St. 2d 307, 329 N.E.2d 85 (1975), Syllabus #1. The case at bar was squarely within the "automatic" standing rule of *Jones v. United States*, 362 U.S. 257 (1960), which was the law at all times during the state court proceedings. In understandable reliance upon *Jones*, Riley did not present any evidence of standing at the suppression hearing. The prosecution never objected, as it was clear that Riley could have easily established his standing. On direct appeal, the standing issue was not briefed or argued by either party. The Court of Appeals, however, held, *sua sponte*, that Riley lacked

standing to contest the search of his home and refused to address the merits of Riley's Fourth Amendment claim. In so holding, the Court of Appeals did not mention or consider *Jones v. United States* or *State v. Morris, supra.*

The Sixth Circuit Court of Appeals found that the Court of Appeals deprived Riley of an opportunity to litigate the standing question. Had Riley ever been afforded a hearing on that issue, he could have easily established his standing to move to suppress. At trial, Officer Keith Baird testified that the premises searched were rented by Riley, and that "it was pretty common knowledge where he lived for the last year." At that time, Riley was justified in relying upon *Jones, see, Linkletter v. Walker,* 481 U.S. 618 (1965), and could easily have met any objection under *Morris* had there been a need to do so. By giving no consideration whatever to controlling case law, the Court of Appeals completely frustrated Riley in his attempt to litigate his Fourth Amendment claim. Riley was effectively denied any hearing on the standing issue and the state appellate court gave no consideration to the merits of his Fourth Amendment claim. This is not a case where the state court simply made an erroneous interpretation of the substantive law.

The Sixth Circuit Court of Appeals made a proper and just application of *Stone v. Powell, supra,* in this case, and its interpretation of that case is neither illogical nor extreme. Where an accused is prevented from making a full presentation of his Fourth Amendment claim because of an unforseeable and unlawful application of a procedural rule, *Stone v. Powell, supra,* does not bar habeas corpus relief.

Other circuit courts have made considerably narrower interpretations of *Stone v. Powell, supra, see, Gamble v. Oklahoma,* 583 F.2d 1161 (10th Cir. 1978); *Pulver v. Cun-*

*ningham*, 562 F.2d 198 (2nd Cir. 1977), *see also Mack v. Cupp*, 564 F.2d 898, 900 (9th Cir. 1977) (dicta). One circuit court has given *Stone* a more expansive reading than the language of that decision can logically support. *See Williams v. Brown*, 609 F.2d 2161 (5th Cir. 1980). But other cases are squarely in accord with the decision in the case at bar, *see, Boyd v. Mintz*, 631 F.2d 247, 250 (3rd Cir. 1980); *Gates v. Henderson*, 568 F.2d 830, 840 (2nd Cir. 1977) (*en banc*), *cert. denied*, 434 U.S. 1038 (1978), *see also, Moore v. Cowan*, 560 F.2d 1298, 1301-1302 (6th Cir. 1977). The Sixth Circuit Court of Appeals has not made any novel or extreme interpretation of the law, nor has it undertaken a sharp break with precedent in its disposition of the instant case.

For these reasons, it is difficult to perceive that any issue of national significance is presented herein. Accordingly, Respondent respectfully submits that the Petition for Certiorari should be denied.

## II. REGARDLESS OF WHETHER A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD EXIST, THE ACTIONS OF THE LAW ENFORCEMENT OFFICERS IN THE CASE AT BAR WERE NOT REASONABLE UNDER THE CIRCUMSTANCE AND THEREFORE CANNOT BE JUSTIFIED AS HAVING BEEN UNDERTAKEN IN GOOD FAITH

Respondent does not concede that there should be a so-called good faith exception to the exclusionary rule. However, even if it is assumed, *arguendo*, that such an exception should be found to exist, there is no indication that the police acted with a reasonable, objective, good faith belief in the propriety of their actions in the case at bar.

For the concept of a "good faith" exception to the exclusionary rule to have any validity, the actions of the officers involved must be objectively reasonable. Subjective good faith alone cannot be sufficient, as the police would then, in effect, be rewarded for their negligence or their ignorance of the law. *See, United States v. Williams*, 622 F.2d 830, 848 (5th Cir. 1980) (*en banc*), *cert. denied*, 449 U.S. 1127 (1981). The exclusionary rule, historically, has been held to deter negligent, as well as wilful, deprivations of constitutional rights. *Michigan v. Tucker*, 417 U.S. 433, 447 (1974). The question of law enforcement officers' good faith has most often been discussed in connection with technical questions, unrelated to the actual conduct of the officers such as whether evidence seized pursuant to an arrest for violation of a statute later found to be unconstitutional should be suppressed. *See, e.g. Michigan v. DeFillippo*, 443 U.S. 31 (1979). *United States v. Reltien*, 422 U.S. 531 (1975), or whether a reasonable and apparently lawful arrest was effectuated beyond the scope of the officers' jurisdiction or authority. *See, e.g. United States v. Williams, supra, United States v. Wilson*, 528 F. Supp. 1129 (S.D. Fla. 1982). Under such circumstances, the actions of the officers are justifiable under the law and by the facts as perceived by them. Accordingly, their actions are objectively reasonable and do not constitute wilful or negligent transgressions of constitutional rights.

In such situations, the actions of the officers appear to be authorized by law and are found to be improper only subsequently and then only in a technical sense. In *Michigan v. DeFillippo, supra*, however, this court made it clear that an arrest made pursuant to a "law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws" or a law which

"violated a controlling precedent" establishing its unconstitutionality would nevertheless require suppression of any evidence seized. *Id.*, 443 U.S. at 38.

Thus, where law enforcement officers act negligently, or out of sheer ignorance, their subjective good faith will not vitiate the application of the exclusionary rule. Where the conduct of law enforcement officers is objectively reasonable and it is apparent that they acted with an informed good faith belief in the propriety of their actions, a different case is presented; but that is not the case at bar.

In the instant case, the officers' belief that they were entitled to rely upon Christian's implicit consent to search Riley's apartment was manifestly unreasonable. Although Christian was in possession of Riley's keys, it must be remembered that Christian had just shot and seriously wounded Riley "under circumstances the legitimacy of which could not be presumed" (A - 1). Accordingly, the police could not reasonably presume that Christian had come into possession of Riley's keys, in a legitimate manner.

The officers who first arrived at the scene all testified that they did not know whose apartment this was, and they all admitted that no inquiry was made in that regard. Deputy Harrow (the evidence technician) was unaware that any consent had been given at all. He assumed that no search warrant was necessary because a "crime scene" was involved—there is, of course, no "crime scene" exception to the warrant requirement *Mincey v. Arizona*, 437 U.S. 385 (1978).

To hold that these officers were acting in good faith under these circumstances would be to sanction negligence and ignorance.

The burden was upon the officers to inquire as to the extent of Christian's dominion over the apartment. *Stoner v. California*, 376 U.S. 483 (1964); *United States v. Matlock*, 415 U.S. 164 (1974). Just because the man who shoots a person may have taken that person's keys does not reasonably support the conclusion that he came into possession of the keys with that person's knowledge or consent. Common sense would place an ordinary man on inquiry as to the extent of the man's authority to give consent for a search of the premises, and the law places upon a police officer the duty to make such an inquiry. Further, given that Christian was distraught to the point of physical illness, it is not clear that he even had the capacity to give a knowing and voluntary consent to anything, even if it is assumed that he had the actual authority to do so. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

It is of material significance that we are dealing with a search of a man's home, where his reasonable expectation of privacy is at its zenith. *Payton v. New York*, 445 U.S. 573, 589-590 (1980). A search warrant should have been obtained before a full-scale "processing of the crime scene" was undertaken and it is reasonable to expect the officers to have done so. Prior to their third warrantless entry into Riley's apartment, the police had already checked the apartment for other victims or assailants and found none. They had already secured the apartment by locking the only door and could have as easily posted a guard, since no less than five (5) officers were present. They had absolutely no reason to believe that any evidence would be lost or destroyed. Further the person who shot Riley was already in custody and Riley himself was in the hospital in critical condition. Under such circumstances a warrant was clearly required, *Mincey v. Arizona*, *supra*, and could

have been easily obtained. Indeed, that would have been the reasonable thing for the officers to have done, and there was no objective or reasonable justification for their not doing so.

Under the totality of the circumstances, the officers' subjective assumption that Christian had authority to consent to a search of the apartment was unreasonable and unjustified. The officers' failure to make any inquiry as to the extent of Christian's dominion over the apartment was negligent, and the objective circumstances do not logically support the contention that the officers' actions were undertaken in good faith.

This is not a case involving a hypertechnical *post-hoc* application of the law which frustrates manifestly reasonable police conduct. This case involves negligent police conduct, ignorance of the law, and generally sloppy police-work, all which resulted in a violation of Respondent's constitutional rights in a situation where Respondent had the maximum reasonable expectation of privacy.

If a good faith exception to the exclusionary rule should exist, it would not be applicable to this case. To hold otherwise would be to sanction negligence, reward ignorance and encourage misfeasance. Such a result would not have support in law or logic.

For these reasons, Respondent respectfully contends that this case is a most inappropriate vehicle through which to consider the necessity for a good faith exception to the exclusionary rule. Accordingly, the petition for a writ of certiorari should be denied.

## CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should not be granted.

WHEREFORE, the petition for certiorari should be denied.

Respectfully submitted,

RALPH DENUNE III
*Counsel of Record*
4405 Talmadge Road
Toledo, Ohio 43624
(419) 473-2922

JOHN F. POTTS
4334 W. Central Avenue
Suite 231
Toledo, Ohio 43615
(419) 537-0737
*Attorneys for Respondent*

## APPENDIX

**Letter Dated 2/15/77 from the Honorable J. Gareth Hitchcock to Counsel Containing the Decision of the Paulding County Court of Common Pleas**

COURT OF COMMON PLEAS
PAULDING COUNTY
PAULDING, OHIO
45879

J. GARETH HITCHCOCK
JUDGE

Telephone
419-399-2811

February 15, 1977

Ralph DeNune III, Esquire
DeNune, Douglas & Bayford
Attorneys at Law
4334 West Central Avenue
Toledo, OH 43615

Re: State of Ohio vs. Joseph Riley
CR-76-569

Dear Mr. DeNune:

The court finds that the defendant Riley's motion to suppress should be overruled. The reasons are that the officer obtained the information by observation from a place he was entitled to be. There is no doubt that defendant was seriously wounded by a shot from a .357 magnum revolver in circumstances the legitimacy of which could not be presumed because of (1) the inherent danger to life and limb and (2) the fact that Ordinance 484 of the Village of Paulding provides:

"Section 1. It shall be unlawful for any person within the corporate limits of the Village of Paulding, Ohio, to discharge any gun, firearm, air rifle, air gun or compressed air gun without first obtaining a permit so to do from the Mayor of the Village of Paulding.

"* * *

"Section 3. Any person found guilty of violating any part of the provisions of this Ordinance shall be fined not less than $1.00 nor more than $100.00 for each separate offense.

"* * *."

Moreover, consent to observe the scene may be inferred from the voluntary surrender of the key to the premises where the shooting occurred to Chief of Police Watson by James Christian. And, particularly in view of the power of a .357 magnum, it is reasonable to trace the trajectory of the bullet by observing the holes made by the firing of a cartridge therefrom, as proof of such fact often is of critical importance in determining whether or not a gunshot has criminal significance.

Consequently, the court finds that Officer Harrow had a right to be where he was when observing in plain view objects referred to in his search warrant testimony.

The court is appreciative of all the citations brought to the court's attention by counsel, to-wit:

1. 403 US 443, 91A SCt 2022, 2038-39. Warrant not obtained from neutral magistrate.

2. 394 FS 1257. Observations made at investigation of shooting.

3. 38 OS2d 237. Evidence obtained outside scope of warrant can't be used.

4. 47 Oh Misc 1. Warrant usually required. Note Syl P2 (2) (5) (6).

5. 365 US 610, 81 SCt 776. No warrant conviction reversed.

6. 333 US 10, 68 SCt 367. No warrant conviction reversed.

7. 399 US 30, 90A SCt 1969. Warrant conviction reversed.

8. 413 US 496, 93A SCt 2796. Re warrant for obscene material.

The court has considered all of them in reaching its decision. A copy of this letter and the journal entry overruling the motion is, of course, being mailed to opposing counsel; also to all counsel of record in Causes No. CR-76-568 and CR-76-570.

With kindest personal regards, I am,

Very truly yours,

/s/ J. GARETH HITCHCOCK
Judge

JGH/ac

Enc.

cc: James P. Spriggs, Esq.
Roy Daniel Chinnis, Esq.
Hon. J. David Webb, P.A.

## 28 U.S.C. Section 2254

**§ 2254 State custody; remedies in Federal courts**

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs

numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.